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No. 00-758

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

MARIA A. GREGORY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

BARBARA D. UNDERWOOD
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

MARY ANNE GIBBONS
General Counsel
United States Postal Service
Washington, D.C. 20260

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1. Respondent's attempt (Br. in Opp. 16-20) to minimize the practical significance of this case is unavailing. The Federal Circuit held "that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." Pet. App. 7a. As we have explained (Pet. 6-7, 14-18), that rule not only contradicts the longstanding administrative practice, but, if allowed to stand, will substantially impede the efforts of federal agencies to meet their statutory mandate of maintaining an efficient civil service. See 5 U.S.C. 7513(a). In particular, the court of appeals' new rule will tie the hands of federal employers in dealing with employee recidivists whose actions establish a pattern or practice of misconduct that warrants more serious discipline

than might be called for by any single incident. At the same time, the court of appeals' ruling creates an incentive for employees, especially less-than-model employees, to initiate proceedings challenging all disciplinary actions, even relatively minor ones.[1]

Claiming that those concerns "are greatly exaggerated," respondent tries (Br. in Opp. 16) to reassure the Court by observing that "the terms of the Federal Circuit's opinion do not state that agencies may never rely on unresolved priors in imposing disciplinary action," but rather "only that *the MSPB* may not rely on unresolved priors in sustaining disciplinary action." That is little comfort, however, to the numerous federal agencies whose decisions are reviewable by the MSPB. If, as the Federal Circuit held, "prior disciplinary actions that are subject to ongoing proceedings may not be used [before the MSPB] to support the reasonableness of a penalty," Pet. App. 1a-2a, then for practical purposes federal agencies—who must defend their actions before the MSPB—may not consider such prior disciplinary actions in calibrating the punishment for recidivist employees.

Respondent suggests (Br. in Opp. 17) that the Federal Circuit's new rule is "nothing more than a principle governing the scheduling of appeals: the MSPB should not decide a case until relevant priors have been arbitrated."

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[1] Respondent's disciplinary record negates the suggestion that she was "a model employee." Br. in Opp. 3. See Pet. 2-3. Moreover, while respondent asserts (Br. in Opp. 3) that she was retaliated against by her supervisors for complaining to the Equal Employment Opportunity Commission (EEOC) and for union activities, the Merit Systems Protection Board (MSPB) considered and rejected those allegations, see Pet. App. 32a-35a, and the Federal Circuit affirmed that conclusion, see *id.* at 4a-5a. See also *id.* at 5a ("[N]o evidence was introduced that would show that discrimination or retaliation played any role in the evaluation of [respondent's] performance or penalty.").

But a rule requiring the MSPB to delay its decisions would contravene the intent of Congress in enacting the Civil Service Reform Act of 1978 (Reform Act). As this Court has observed, one of the purposes of that Act was to *streamline* the appeals process. See *United States* v. *Fausto*, 484 U.S. 439, 445 (1988) (citing S. Rep. No. 969, 95th Cong., 2d Sess. 9 (1978)). In addition, such a rule would prolong uncertainty as to the finality of important employment decisions, further disrupting the workplace to the detriment of federal employers and employees. MSPB review could be held in abeyance for months or even (as would be true in this case) years while pending grievances or other proceedings were completed.

Respondent claims (Br. in Opp. 17-18) that, "in the normal course, challenges to prior disciplinary actions will be resolved sooner than challenges to later ones, so that grievances concerning priors will usually have been resolved by the time the MSPB is ready to decide," and that, therefore, "it will likely be the rare case in which a later-initiated MSPB proceeding leapfrogs an earlier-initiated grievance proceeding." That claim is unsupported and incorrect. This case illustrates that cases can and do reach the MSPB in that posture in the ordinary course. The inherent informality of grievance proceedings often results in delay, including at the request of the parties. It is not uncommon, moreover, for parties voluntarily to defer arbitration while litigation of more serious disciplinary action is pending before the MSPB, as the parties in this case initially agreed to do.

More important, respondent's discussion of "leap-frogging" *in the MSPB* does not address the extremely common situation in which a federal agency must discipline a recidivist employee while grievance proceedings are still pending with respect to prior disciplinary actions against that employee. As discussed above, in deciding what punishment is appropriate in those circumstances, the Federal Circuit's

decision effectively requires federal employers to ignore the prior disciplinary actions—even those suggesting a pattern of misconduct threatening the efficiency of the federal workplace or the safety of individuals who work there—for as long as the actions remain subject to pending grievance proceedings that may take *years* to complete.[2]

Respondent asks (Br. in Opp. 20) this Court to dismiss the concern that recidivist employees will file frivolous grievances to insulate their prior disciplinary actions from review in connection with later misconduct on the ground that, "[u]nder most collective bargaining agreements, only the union can file a grievance." As respondent acknowledges, however, that is not true with respect to the collective bargaining agreement involved in this case. See *id.* at 6 ("A disciplined postal worker (or her union) may file a grievance pursuant to the applicable collective bargaining agreement."). Moreover, the Reform Act specifically provides that "[a]ny negotiated grievance procedure" must "assure * * * an employee the right to present a grievance on the employee's own behalf." 5 U.S.C. 7121(b)(1)(C)(ii). And, in any event, the ability of federal agencies to maintain an efficient civil service should not be subordinated to the discretion of local union officials who owe a special obligation to union members.

2. Respondent's effort (Br. in Opp. 1-2, 11-15) to show that this case is a poor vehicle to decide the important question presented is equally lacking in support. The question presented was squarely raised and decided by the

[2] In addition, it is not unusual for litigation to proceed in the MSPB while prior disciplinary actions are being challenged in the EEOC. EEOC proceedings and subsequent court appeals often take several years to complete. Under the Federal Circuit's rule, federal agencies and the MSPB could not consider a prior disciplinary action (or series of actions) that remained subject to those proceedings as well.

court of appeals below, see Pet. App. 7a, and that question is directly at issue here.

a. Contrary to respondent's suggestion (Br. in Opp. 11), the Postal Service argued below that it was entitled to consider respondent's entire disciplinary record, including disciplinary actions subject to pending proceedings, in determining the appropriate sanction for her latest infraction. In her Federal Circuit brief, respondent argued that the MSPB had erred in relying on her prior disciplinary actions in removing her, and submitted new evidence (not presented to the MSPB) that she contended supported her challenge to the prior discipline. Pet. C.A. Br. 2-4. In response, the Postal Service argued that, "[i]n determining the reasonableness of the penalty, [respondent's] disciplinary record was correctly considered." Gov't C.A. Br. 16. In addition, the Postal Service argued that respondent should not be permitted for the first time on appeal to present new evidence challenging the prior disciplinary actions. *Ibid.*

The Federal Circuit held "that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits," and vacated the MSPB's decision. Pet. App. 7a. At that point, the Postal Service filed a petition for rehearing, arguing that the new ruling was wrong as a matter of law and ill-advised as a matter of policy. See Gov't C.A. Pet. for Reh'g 11-20. In so arguing, the Postal Service elaborated on the position stated in its merits brief that the MSPB properly considered respondent's prior disciplinary record in affirming her removal. But that elaboration—in response to the court of appeals' decision overturning the longstanding administrative practice—does not now insulate the court of appeals' ruling from review in this Court.[3]

[3] Because the arguments made in the Postal Service's petition for rehearing overlapped with the position stated in the agency's merits

b. Respondent is also mistaken in claiming (Br. in Opp. 11) that the question presented "is not implicated on the facts of this case." That argument is based on the assumption that respondent's second and third disciplinary actions were based on the first action (the May 1997 letter of warning overturned by the arbitrator), and that therefore the Postal Service could not consider the second and third actions in reviewing the reasonableness of the penalty respondent received for her *fourth* infraction. See *id.* at 11-12. But respondent apparently recognizes that this assumption is not necessarily correct and, as a result, claims only—without support—that it is "likely" correct. *Id.* at 12 n.5. Moreover, respondent acknowledges that "the MSPB may be entitled to rely at least on the findings of infraction in Cases 2 and 3—even if not on the penalty imposed in those cases," *ibid.*, though the Federal Circuit held to the contrary. See Pet. App. 7a.

The Federal Circuit erroneously directed the MSPB to reevaluate respondent's removal, or direct the Postal Service to do so, without regard to any disciplinary actions subject to pending challenges. Two of respondent's prior disciplinary actions remained undisturbed. Thus, at a minimum, the MSPB should be free to consider whether respondent's latest punishment remains appropriate in light of

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brief—*i.e.*, that, "[i]n determining the reasonableness of the penalty, [respondent's] disciplinary record was correctly considered," Gov't C.A. Br. 12—respondent is wrong in suggesting that the Postal Service was precluded from making those arguments in support of rehearing. See Br. in Opp. 11. In any event, regardless of what the Postal Service had argued in its merits brief, the Postal Service was entitled to respond in its petition for rehearing to the sweeping rule of decision that was announced by the Federal Circuit. Cf. *American Potash & Chem. Corp.* v. *United States*, 402 F.2d 1000, 1002 n.5 (Ct. Cl. 1968) (considering "new issue raised for the first time in a petition for rehearing" where "the court itself raised and discussed the question" in the panel decision).

those prior actions.[4] The *possibility* that the Board might decide in the event of a remand that respondent's removal is no longer appropriate in light of her prior disciplinary record (minus the first incident) in no way makes it "unnecessary" (Br. in Opp. 13) for this Court to decide whether that inquiry may be undertaken by the Board in the first place.[5]

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[4] In its petition for rehearing, the Postal Service suggested that the court of appeals should "remand this action to the MSPB to determine the issue of the appropriate penalty, with instructions that the board may not consider the one prior disciplinary action that was overturned by the arbitrator." Gov't C.A. Pet. for Reh'g 20. If this Court grants certiorari and reverses the Federal Circuit's decision, however, the court of appeals could decide that such a remand would be unnecessary or inappropriate. The Reform Act provides that the Federal Circuit "shall review the record" of MSPB proceedings and set aside the findings or conclusions of those proceedings when they are unlawful. 5 U.S.C. 7703(c). Respondent did not place into the record of the MSPB proceedings the arbitrator's decision overturning the first disciplinary action (even though that decision was issued months before the MSPB's initial decision became final); instead, the Federal Circuit took "judicial notice" of the arbitrator's decision. Pet. App. 5a. Accordingly, if this Court concludes that the MSPB was entitled to consider respondent's prior disciplinary actions and reverses the court of appeals' decision, then on remand the Federal Circuit could decide that in reviewing the MSPB's decision the court was limited to "the record" (5 U.S.C. 7703(c)) that was before the MSPB, and that the MSPB's initial decision in this case should be reinstated based on that record. That result would not leave respondent without an avenue for bringing to the attention of the MSPB the arbitrator's July 1999 decision. As we have explained (Pet. 14), the MSPB has the discretion to reopen any case to reconsider its decision.

[5] In fact, in upholding respondent's removal penalty, the MSPB did not place any particular reliance on the May 1997 letter of warning that was later overturned. Instead, the Board emphasized that respondent's prior disciplinary actions had "involved unauthorized overtime," a reference to the misconduct resulting in respondent's suspension on August 18, 1997, for unrelated infractions. Pet. App. 37a. See *id.* at 37a-38a ("At first blush, a removal for one instance of failure to perform duties satisfactorily may appear unreasonable. However, *considering the appellant's prior*

c. Respondent claims (Br. in Opp. 2) that there is "no reason" why this Court should grant review in this case. The enormous practical significance of this case to the federal civil service system, however, counsels strongly in favor of deciding the question presented at this time. If the Federal Circuit's decision is allowed to stand, it will require a fundamental change in the manner in which discipline is calibrated by federal employers. Moreover, as we have explained (Pet. 6-7), it will be difficult for an agency to challenge the MSPB's refusal in a subsequent case to consider a recidivist employee's prior disciplinary actions in reviewing a penalty, because, as respondent acknowledges (Br. in Opp. 14 & n.6), agencies do not enjoy an automatic right of appeal from adverse MSPB decisions. See 5 U.S.C. 7703(a)(1); 5 U.S.C. 7703(d) (1994 & Supp. IV 1998).[6] Respondent claims (Br. in Opp. 14) that the government may ask the Federal Circuit to exercise its "discretionary jurisdiction" to accept such an appeal. But respondent does not explain why the Federal Circuit would do so to consider a question that it already has decided in this case. See note 6, *supra*. Respondent also suggests that the government may seek certiorari in this Court if the Federal Circuit denies the government's

disciplinary actions also involved unauthorized overtime, that one instance takes on additional significance and tends to reveal a pattern of conduct by the appellant to disregard the agency's and her supervisor's expectations of her performance and conduct.") (emphasis added).

[6] The Reform Act authorizes the Office of Personnel Management (OPM), not the immediately affected agency, to petition for review of an adverse MSPB ruling, and states that "[t]he granting of [such a] petition * * * shall be at the discretion of the Court of Appeals." 5 U.S.C. 7703(d). OPM invokes its right to petition for review of adverse MSPB decisions in only a few cases each year. Moreover, the Federal Circuit has held that "OPM should only bring a petition for review in 'exceptional' cases," and has indicated that the Board's decision to mitigate a penalty in a particular case ordinarily will not meet that standard. *Devine* v. *Sutermeister*, 724 F.2d 1558, 1566 (1983).

request for review. Br. in Opp. 14 n.6. But in that scenario this Court would be left without the benefit of a court of appeals' decision fleshing out the case, and the absence of such a decision would likely make such a case less appropriate for review than this one. In short, the alternative avenues of review claimed by respondent are illusory.[7]

3. Respondent devotes (Br. in Opp. 20-22) little effort to defending the court of appeals' decision on the merits. Respondent suggests, however, that the Federal Circuit's rule is supported by the fact that federal agencies do not have an incentive to make sound employment decisions in the first instance and that, instead, they actually have a "strong incentive to get [such decisions] *wrong* the first time." *Id.* at 22. That supposition is completely unfounded, ignores the presumption of correctness that is typically afforded administrative actions (see Pet. 12), and assumes that federal employers will ignore their statutory mandate to maintain an efficient civil service system.[8]

As we have explained in our petition (at 9-12), and respondent does not seriously attempt to rebut, the longstanding administrative practice is that federal employers may—and, indeed, should—consider an employee's prior disciplinary record in calibrating the punishment for subsequent misconduct, including disciplinary actions that remain the sub-

[7] As we have explained (Pet. 6), the absence of a circuit conflict does not counsel against granting certiorari in this case. And respondent acknowledges (Br. in Opp. 10) that "[b]ecause the Federal Circuit has exclusive jurisdiction over appeals from the MSPB, the decision below * * * could not conflict with the decision of any other court of appeals."

[8] Respondent claims (Br. in Opp. 21) that "disciplinary action is not final agency action." But the fact that an agency's decision to remove an employee is subject to challenge in the MSPB, a separate administrative entity, does not render the disciplinary action of the agency-employer interlocutory, or otherwise affect application of the presumption of correctness that has long been afforded agency action. See Pet. 12.

ject of a pending grievance or other proceedings. That practice is consistent with the protections afforded federal employees under the Reform Act, and promotes government efficiency. The Federal Circuit's decision in this case constitutes a stark departure from that practice. That departure is not supported by any existing federal law or policy. And it amounts to an unwarranted judicial incursion into the sensitive area of federal employer-employee relations.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

MARY ANNE GIBBONS
General Counsel
United States Postal Service

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